

RECEIVED

JUN 25 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)

Implementation of the Local)
Competition Provisions of the)
Telecommunications Act of 1996)

CC Docket No. 96-98

Joint Petition of BellSouth, SBC and Verizon)
For Elimination of Mandatory Unbundling of)
High-Capacity Loops and Dedicated Transport)

To the Commission:

**JOINT REPLY COMMENTS OF
CBeyond COMMUNICATIONS, LLC;
CTC EXCHANGE SERVICES, INC.;
E.SPIRE COMMUNICATIONS, INC.;
INTERMEDIA COMMUNICATIONS INC.;
KMC TELECOM HOLDINGS, INC.;
NET2000 COMMUNICATIONS SERVICES, INC.; AND
NUVOX, INC.**

Brad E. Mutschelknaus
John J. Heitmann
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 955-9600
(202) 955-9782 (fax)
jheitmann@kelleydrye.com

*Counsel for Cbeyond Communications, LLC;
CTC Exchange Services, Inc.; e.spire
Communications, Inc.; Intermedia
Communications Inc.; KMC Telecom Holdings,
Inc.; Net2000 Communications Services, Inc.;
and NuVox, Inc.*

June 25, 2001

No. of Copies rec'd 0+7
List ABCDE

TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY	2
I. THE NEAR UNANIMOUS OPPOSITION TO THE PETITION INCLUDES EVEN AN RBOC AND A PART OF USTA.....	4
II. THE COMMISSION SHOULD AFFIRMATIVELY REJECT USTA’S PROPOSED “CLEC SAFETY MECHANISM”	7
CONCLUSION.....	10

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Implementation of the Local)	
Competition Provisions of the)	CC Docket No. 96-98
Telecommunications Act of 1996)	
)	
Joint Petition of BellSouth, SBC and Verizon)	
For Elimination of Mandatory Unbundling of)	
High-Capacity Loops and Dedicated Transport)	

To the Commission:

**JOINT COMMENTS OF
CBEYOND COMMUNICATIONS, LLC;
CTC EXCHANGE SERVICES, INC.;
E.SPIRE COMMUNICATIONS, INC.;
INTERMEDIA COMMUNICATIONS INC.;
KMC TELECOM HOLDINGS, INC.;
NET2000 COMMUNICATIONS SERVICES, INC.; AND
NUVOX, INC.**

Cbeyond Communications, LLC (“Cbeyond”), CTC Exchange Services, Inc. (“CTC Exchange”), e.spire Communications, Inc. (“e.spire”), Intermedia Communications Inc. (“Intermedia”), KMC Telecom Holdings, Inc. (“KMC”), Net2000 Communications Services, Inc. (“Net2000”), and NuVox, Inc. (“NuVox”) (collectively, the “CLEC Coalition”),¹ by their attorneys, submit these reply comments in accordance with the Commission’s Public Notice requesting comment and replies on the above-captioned petition filed by BellSouth, SBC and Verizon (the “RBOCs”).²

¹ The CLEC Coalition members consist of facilities-based CLECs with diverse networks and business plans.

² *Pleading Cycle Established for Comments on Joint Petition of BellSouth, SBC and Verizon*, CC Docket No. 96-98, Public Notice, DA 01-911 (rel. Apr. 10, 2001) (“Public Notice”); *Common Carrier Bureau Grants Motion for Extension of Time for Filing Comments and Reply Comments on BOC Joint Motion Regarding Unbundled Network Elements*, CC Docket No. 96-98, Public Notice, DA 01-1041 (rel. Apr. 23, 2001).

INTRODUCTION AND SUMMARY

The record overwhelmingly demonstrates that the RBOC Petition is procedurally defective and devoid of any legal or evidentiary basis upon which the Commission should or could reverse its *UNE Remand Order* or repeal the market-opening, field-leveling provisions of Section 251 of the Act. Indeed, it appears that only *one* commenter filed in support of the RBOC Petition. Not surprisingly, that commenter was USTA – an organization largely funded by the RBOC Petitioners. Notably, while USTA supported the RBOC Petition, the USTA CLEC Council (“USTA CC”), filed in opposition to the RBOC Petition. Perhaps even more notable is the fact that Qwest – the lone RBOC not signing the Petition – has now filed in opposition to it.

Thus, the record makes clear that the only interested parties that support the Petition are the three RBOCs that filed it. All others denounced the Petition and called on the Commission to quickly put an end to the RBOCs’ mischief by dismissing it on procedural grounds or denying it on the merits.

In light of the overwhelming record developed in favor of dismissing or denying the RBOC Petition, the scope of these replies will be limited. These replies will highlight the fact that the only RBOC that refused to join in the Petition, has now gone on record opposing it. Indeed, Qwest opposed the Petition on grounds that it is untimely and that it, too, would be impaired without access to high capacity loop and transport UNEs.

These replies also will highlight the fact that the RBOCs’ own industry association could not even muster full support for the RBOC Petition. USTA CC called for dismissal of the Petition on grounds that it is untimely. USTA CC also echoed other commenters’ concerns in claiming that grant of the Petition would cause irreparable harm to CLECs. Noting that

unbundling encourages facilities deployment by CLECs and that replication of ILEC networks is impossible, USTA CC refuted the RBOCs' (and USTA's) arguments to the contrary. Tellingly, USTA CC also attacked the accuracy, veracity and relevance of the USTA Report and Crandall Declaration and described the RBOC effort as "weak" and devoid of "serious-minded analysis".

In these replies, the CLEC Coalition also rebuts USTA's other comments, in which the RBOCs regurgitate tired arguments served-up in the Petition and already rejected by the Commission in the *UNE Remand Order*. In this regard, the CLEC Coalition asks the Commission to affirmatively reject the paradigm-shifting premise of USTA's proposed "CLEC safety mechanism". If, as USTA proposes, CLECs are faced with the burden of proving on a case-by-case basis an "exception" to the RBOCs' proposed roll-back of Section 251 and the Commission's high capacity loop and dedicated transport unbundling rules, the RBOCs will have won this battle and possibly the war. Charged with implementation and enforcement of the market-opening, field-leveling provisions of Section 251 of the Act (the requirements of which, the RBOCs agreed to in exchange for Section 271), the Commission, of course, cannot accept USTA's incongruous proposal. Instead, the Commission must reject it and the RBOC Petition. Such action is necessary to save competitors, consumers, the economy, and the RBOCs themselves (ultimately, their monopolies will come undone) from the strangling side-effects of the RBOCs' nasty addiction to supracompetitive special access profits (the preservation and

bolstering of which runs through the heart of their request for the Commission to eliminate high capacity UNEs).³

DISCUSSION

I. THE NEAR UNANIMOUS OPPOSITION TO THE PETITION INCLUDES EVEN AN RBOC AND A PART OF USTA

If ever there was an opening round knock-out delivered in a regulatory proceeding, this is it. In its opening comments, the CLEC Coalition indicated that it, CompTel and ALTS are united in opposition to the RBOC Petition. A broad array of industry participants joined the CLEC Coalition in calling for the immediate dismissal or denial of the RBOC Petition. These participants include the New York DPS, ACSENT, and the Coalition of Competitive Fiber Providers (“CCFP”) (upon whom the RBOCs attempted to rest much of their very weak case).⁴

Other facilities-based CLECs such as, XO, ATG, Broadslate, Focal, Covad, Allegiance and McLoedUSA also filed in opposition and joined the CLEC Coalition in contributing to the development of a strong record upon which the Commission can quickly act to deny the RBOC Petition. “Next generation” CLEC Z-Tel skewered the RBOC Petition and bandwidth market-makers Enron, Dynegy, and El Paso also called on the Commission to reject it. The list of

³ In as much as the RBOC Petition seeks to push competitors’ costs even higher by forcing additional reliance on RBOC special access for middle and last mile connectivity, it also amounts to an impermissible collateral attack on the Commission’s TELRIC pricing standard.

⁴ Notably, the CCFP argued that the RBOCs deny competitive fiber providers (“CFPs”) reasonable and nondiscriminatory access to central offices (including the ability to extend fiber into central offices, to install feeder distribution frames, and to cross-connect with collocated competitors) and underscored the fact that, without such access, there could be no true alternatives to ILEC high capacity UNEs. CCFP Comments at 1-2, 8-9. Filling-out this point, the CFPs emphasized that backhauling traffic to competitive carrier collocation hotels puts CLECs at a significant competitive disadvantage. *Id.* The CFPs also reminded the RBOCs that planned networks do not eliminate present impairment. Moreover, the CFPs asserted that, even when fully constructed, competitive fiber networks will not provide a ubiquitous substitute for ILEC high capacity loops and transport. Based on the collective experience of its members and publicly available information, the CLEC Coalition concurs with the CCFP on each of these points.

industry participants opposing the RBOC Petition is rounded out by wireless providers VoiceStream and Nextel, equipment manufacturer Copper Mountain, and the “big IXCs” WorldCom, Sprint and AT&T.

Even Qwest, which was the sole RBOC that had not signed onto the RBOC Petition, joined the rest of the industry in opposing it and calling on the Commission to dismiss or deny it. Indeed, Qwest opposed the Petition on grounds that it is untimely⁵ and that its out-of-region operations would be impaired without access to high capacity loop and transport UNEs.⁶ Qwest also espoused the views that sufficient market alternatives to ILEC UNEs currently do not exist⁷ and that CLECs cannot self-provision high capacity loops and transport without impairment (*vis-à-vis* the use of high capacity UNEs).⁸ The CLEC Coalition agrees with Qwest on these points.⁹

Only USTA, an organization financed by the RBOCs filed in support of the Petition. Yet, USTA could not even muster full support, with Qwest dissenting from the RBOC party line and its own USTA-CC also filing in opposition to the RBOC Petition. Such dissent within the RBOC ranks is especially telling.¹⁰

⁵ Qwest Comments at 1-4 (arguing that the appeals of the *Local Competition* and *UNE Remand Orders* should be resolved prior to their un- or re-doing).

⁶ *Id.*

⁷ *Id.*, at 2 (“Qwest would not be able . . . to find market alternatives for these UNEs”).

⁸ *Id.* (“build economics cannot compete with . . . UNE elements”). Notably, the CLEC Coalition disagrees with Qwest’s implied contention that this is the case because UNEs are not properly priced. *See id.* Rather, it seems more likely that special access is “artificially priced”, and that UNE prices are more likely to resemble those that would be set by a properly functioning market.

⁹ The CLEC Coalition agrees with Qwest on only these conclusions and not necessarily on the reasoning that leads Qwest to them.

¹⁰ Qwest’s dissent is particularly revealing, given the fact that Qwest is the only RBOC with significant out-of-region domestic operations (albeit predominantly interexchange in nature).

In accord with the CLEC Coalition and the rest of the industry, USTA CC called for dismissal of the Petition on grounds that it is untimely.¹¹ USTA CC also echoed other commenters' concerns with its assertion that grant of the Petition would cause irreparable harm to CLECs, particularly in light of today's perilously tight financial markets.¹² Notably, USTA CC argued that CLECs would be more than impaired without access to high capacity UNEs, and concluded that "it is obvious that UNEs are absolutely essential for the survival of many CLECs, as they simply would not be able to offer service without them."¹³ The CLEC Coalition concurs.

Significantly, USTA CC also took "strong issue" with the RBOCs' (and USTA's) now tired and previously rejected argument that unbundling deters investment, innovation and competition.¹⁴ Indeed, the facilities-based carriers that form the CLEC Coalition agree with USTA CC's assertion that the availability of high capacity loop and transport UNEs fosters investment and facilitates viable facilities-based competition.¹⁵ Moreover, high capacity UNEs often provide CLECs with the only economically feasible means of delivering broadband to smaller customers often ignored and under-served by the RBOCs.¹⁶

¹¹ USTA CC Comments at 3.

¹² *Id.*, at 3-4.

¹³ *Id.*, at 4.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See, e.g.*, Copper Mountain Comments at 2-6; Markle Aff. (Cbeyond), ¶ 6, (attached to CLEC Coalition Comments).

Notably, USTA CC also attacked the accuracy, veracity and relevance of the USTA Report and Crandall Declaration and described the RBOCs' evidentiary effort as "weak" and devoid of "serious-minded analysis".¹⁷

In sum, USTA CC echoed the views of all others but USTA and the RBOCs (except Qwest) that heavily finance it when it concluded:

*The supporting data the Petitioners provide are inadequate, the assumptions they use to analyze them are incorrect, and the conclusions they draw are wrong.*¹⁸

The CLEC Coalition agrees and for these reasons respectfully submits that the Commission should deny the RBOC Petition.

II. THE COMMISSION SHOULD AFFIRMATIVELY REJECT USTA'S PROPOSED "CLEC SAFETY MECHANISM"

As indicated above, the only party to file comments in support of RBOC Petition was USTA. Through USTA's comments, BellSouth, SBC and Verizon regurgitate the same tired arguments they served-up in the Petition and that the Commission already rejected in the *UNE Remand Order*. The CLEC Coalition rebutted these arguments in its opening comments and need not do so again here. Indeed, the only aspect of USTA's comments in need of a reply is USTA's proposed "CLEC safety mechanism".

¹⁷ E.g., USTA CC Comments at 6 ("Despite the claims of the Crandall Declaration" . . .); 7 (expressing disagreement with the evidentiary conclusions expressed by the RBOCs); 8 (concluding that the proffered evidence does not provide the appropriate "marketplace information"); 9 (USTA Report includes data on networks that are planned, but not built).

¹⁸ *Id.*, at 11 (emphasis added).

As though tossing the Commission and the competitive industry a bone (presumably for the sought-after obedient acceptance of the RBOCs' proposed undoing of Section 251), USTA proposes that:

For some transitional period, CLECs ought to have the ability to demonstrate on an exception basis, that the impairment standard can be met for as to high-capacity loops and/or dedicated transport for a particular geographic segment of the local exchange market.¹⁹

This, USTA cynically calls the "CLEC Safety Mechanism". However, USTA's CLEC Safety Mechanism is nothing less than a proposal to turn on head Section 251 of the Act and the entire competitive paradigm established by the Commission.

The record plainly demonstrates that CLECs remain impaired without access to high capacity UNEs.²⁰ No credible evidence or legal argument has been presented to demonstrate the contrary. Section 251 and the Commission's unbundling rules do not contemplate the Commission addressing CLEC unbundling requests on a case-by-case basis, no more than they contemplate that unbundling will be the "exception" rather than the rule. Competitors are having difficulty enough getting high capacity UNEs provisioned by ILECs with today's clear and unambiguous unbundling requirements. Erecting the barrier of case-by-case regulatory review proposed by USTA surely would snuff-out UNEs as a form of competitive entry and may wipe-out facilities-based entry entirely.²¹

¹⁹ USTA Comments at 16.

²⁰ *E.g.*, NY DPS Comments at 1; Covad Comments at 7, 10; CCFP Comments at 5; McLoedUSA Comments at 2-5; Mpower Comments at 12; Qwest Comments at 2; TDS Comments at 3-6; VoiceStream Comments at 2-4; WorldCom Comments at 7-13.

²¹ The USTA CLEC Safety Mechanism is indicative of the RBOCs' methodical campaign and oft-used tactic to win with delay. Even if, under the mechanism proposed by USTA, a CLEC were to prevail in litigation and obtain an "exception" providing for mandatory unbundling for a particular serving arrangement, the

... Continued

Thus, the CLEC Coalition asks the Commission to affirmatively reject the paradigm-shifting premise of USTA's proposed "CLEC safety mechanism". The proposed switch from mandatory unbundling to unbundling as an exception, would paralyze competition (if not the Commission) and, in this case, would leave the RBOCs fatter-than-ever with special access profits – at the expense of competitors, consumers and the emerging broadband economy.

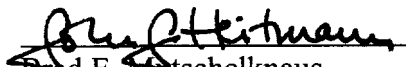
sales opportunity likely will long be gone. Thus, USTA's "CLEC safety mechanism" is a dangerous charade amounting to nothing more than an RBOC customer retention mechanism.

CONCLUSION

For all of the foregoing reasons, the Commission should dismiss or deny the RBOC Petition on grounds that it is untimely, procedurally defective, and that it does not otherwise provide an evidentiary basis upon which the Commission should reverse its rules or repeal sections of the 1996 Act.

Respectfully submitted,

**CBEYOND COMMUNICATIONS, LLC,
CTC EXCHANGE SERVICES, INC.;
E.SPIRE COMMUNICATIONS, INC.;
INTERMEDIA COMMUNICATIONS
INC.; KMC TELECOM, INC.;
NET2000 COMMUNICATIONS
SERVICES, INC.; AND
NUVOX, INC.**

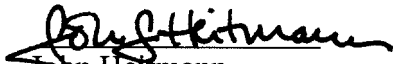
By: 
Brad E. Mutschelknaus
John J. Heitmann
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 955-9600
(202) 955-9782 (fax)
jheitmann@kelleydrye.com

*Counsel for Cbeyond Communications, LLC;
CTC Exchange Services, Inc.; e.spire
Communications, Inc.; Intermedia
Communications Inc.; KMC Telecom Holdings,
Inc.; Net2000 Communications Services, Inc.;
and NuVox, Inc.*

June 25, 2001

CERTIFICATE OF SERVICE
CC Docket No. 96-98

I, John Heitmann, hereby certify that copies of the foregoing Joint Reply Comments were served on June 25, 2001 via carrier on the following persons.


John Heitmann

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(original plus seven copies)

Bryan Tramont
Senior Legal Advisor
Office of Commissioner
Kathleen Q. Abernathy
Federal Communications Communication
445 12th Street, S.W.
Washington, D.C. 20554

Kyle Dixon
Legal Advisor
Office of Chairman
Michael K. Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Kdixon@fcc.gov

Paul Gallant
Senior Legal Advisor
Office of Commissioner
Gloria Tristani
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Pgallant@fcc.gov

Michelle Carey
Chief Policy and Program Planning
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Mcarey@fcc.gov

Jordan Goldstein
Senior Legal Advisor
Office of Commissioner
Michael J. Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dorothy Attwood
Bureau Chief
Common Carrier Bureau
Federal Communications Communication
445 12th Street, S.W.
Washington, D.C. 20554
Dattwood@fcc.gov

Jeffrey J. Carlisle
Senior Deputy Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Jcarlisl@fcc.gov

Glen Reynolds
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Greynold@fcc.gov

Legal Advisor
Office of Commissioner
Keven J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Julie Veach
Common Carrier Bureau
Policy Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Jveach@fcc.gov

Jeremy Miller
Common Carrier Bureau
Policy Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Daniel R. Shiman
Industry Economist
Common Carrier Bureau
Policy Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jonathan Reel
Common Carrier Bureau
Policy Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jodie Donovan-May
Legal Advisor
Common Carrier Bureau
Policy Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Jdonovan@fcc.gov

Janice Myles
Common Carrier Bureau
Policy Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

International Transcription Services
1231 20th Street, N.W.
Washington, D.C. 20036